

SECTION-BY-SECTION ANALYSIS OF S. 1035

Section 1 (a). Prohibits inquiry of an applicant or employee concerning his race, religion, or national origin. It permits inquiry into the national origins of an employee when determined necessary or advisable to determine suitability for assignment to activities or undertakings related to the national security within the United States or to activities or undertakings of any nature outside the United States.

This provision is intended to implement the concept underlying the merit system by which a person's race, religion, or national origin have no bearing on his right to retain a Federal position. It does not limit the existing authority of the Executive Branch to acquire such information by means other than self disclosure.

This section does not create serious problems, although there may be instances when it would be useful to inquire of an employee or applicant directly as to his religion prior to assigning him to an overseas post. For example, it would not be wise to send a Hebrew to an Arab country, nor a Muslim to Israel.

Section 1 (b). Prohibits taking notice of attendance or lack of attendance at any assemblage, discussion, or lecture held or called by any officer of the Executive Branch, or by any outside parties or organizations to advise, instruct or indoctrinate any civilian employee in respect to any matter or subject other than the performance of official duties.

The purpose of this section is to protect employees from compulsion to attend meetings, discussions, and lectures on political, social, and economic subjects unrelated to his duties.

The purpose is commendable and if confined to the stated purpose this section would cause no problems. However, the language is so broad that it can be interpreted to prohibit a department or agency from taking notice of the attendance of an employee at meetings of subversive organizations or meetings designed to undermine the Government of the United States. Many departments and agencies, and particularly those dealing with security matters, would find such a prohibition intolerable.

Section 1 (c). Makes it unlawful to require or request an employee to participate in any activity or undertaking unless related to the performance of official duties to which he is or may be assigned.

The section is directed against official practices, requests, or orders that an employee take part in any civic function, political program, or community endeavor, or other activity which is unrelated to his employment.

There is no quarrel with the intent of this section. However, concern has been expressed that the broad language could be interpreted to make it illegal for an officer to hold meetings with employees on such beneficial matters as highway and industrial safety, security consciousness, and income tax assistance, or to advise employees in regard to their rights to join unions or to participate in the activities of professional societies.

Section 1 (d). Makes it unlawful to require an employee to make any report of his activities or undertakings not related to the performance of official duties unless there is reason to believe that the employee is engaged in outside activities or employment in conflict with his official duties.

The purpose of this section is to guarantee the freedom of an employee to participate in any endeavor or activity in his private life as a citizen, free of compulsion to report to supervisors his action or inaction, his involvement or his noninvolvement. It is to assure that he is free of intimidation or inhibition as a result of the employment.

This section is of primary importance to those agencies concerned with security matters which could be seriously compromised by employee activities and relationships not directly connected with his employment. Security agencies must request their employees to report contacts with foreign officials not only that the employer may have notice of the relationship but also to protect the employee in his personal security should the foreign official be a member of an intelligence service. Similarly, the security agencies must request employees to submit publications and speeches for clearance in advance to insure that there is no inadvertent disclosure of intelligence information.

Section 1 (e). Makes it unlawful to require or request any applicant or employee to submit to any interrogation or examination designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters. The section also prohibits the use of psychological testing to inquire into these same areas. These questions may be asked only on the determination by a physician

that they are necessary to enable him to determine whether or not an employee is suffering from mental illness. An employee may be informed of a specific charge of sexual misconduct and afforded an opportunity to refute the charge.

Section 6 provides an exemption for the FBI, the CIA and the NSA. These agencies may use psychological testing in the proscribed areas on the basis of a personal finding by the Directors, or their designees, in each individual case that the information is necessary to protect the national security.

Psychological testing in the proscribed areas is part of the total screening process which has been established to weed out applicants with undesirable traits. It is of primary concern to the security agencies. The exemption provided by Section 6 affords some relief, but it will still be necessary to make personal findings in each individual case if the Directors are to comply with the spirit of the law.

Section 1 (f). Prohibits the use of a polygraph test designed to elicit from an applicant or employee information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices or concerning his attitude or conduct with respect to sexual matters.

The purpose is not to prohibit the use of the polygraph but to prohibit its use to elicit information considered to be of a personal nature.

Section 6 grants a partial exemption to the FBI, the CIA and the NSA. The polygraph may be used in the proscribed areas on the basis of a personal finding by the Directors, or their designees, in each individual case that the test is necessary to protect the national security. As with the psychological testing, polygraph testing is of primary concern to the security agencies who have found it to be a very useful aid to supplement field investigation in screening out unsuitable employees. It is particularly useful in uncovering undesirable characteristics which do not appear in field investigations.

Section 1 (g). Makes it unlawful to require an employee to support the nomination or election of anyone to public office.

The purpose of this section is to assure that the employee is free from any job-related pressures to conform his thoughts and attitudes and actions in political matters unrelated to his job to those of his supervisors. With respect to his superiors, it protects him in the privacy of his contribution or lack of contribution to the civic affairs and political life of his community, State and Nation.

Section 1 (h). Makes it illegal to coerce or attempt to coerce an employee to invest in bonds or other Government obligations or securities, or to make donations to any institution or cause.

This section is aimed at coercion. It does not prohibit officials from calling meetings or taking any other appropriate action to afford employees the opportunity voluntarily to invest their earnings in bonds or other obligations or voluntarily to make donations to any institution or cause.

Section 1 (i). Makes it illegal to request any employee to disclose any items of his property, income, or other assets, sources of income, or liabilities. The first proviso excepts those employees who have authority to make final determination with respect to claims which require expenditure of monies of the United States. The second proviso excepts reports as may be necessary or appropriate for the determination of liabilities for taxes, tariffs, custom duties, or other obligations imposed by law.

Section 6 grants a partial exemption for the FBI, the NSA and the CIA. Financial disclosure may be requested of an employee or applicant on the basis of a personal finding by the Directors, or their designees, in each individual case that the information is necessary to protect the national security.

Section 1 (j). Makes it illegal to request financial disclosure from those employees excepted under the first proviso of subsection (i) other than specific items tending to indicate a conflict of interest.

Full financial disclosure assists both the employee and the Government in making what at best is a difficult decision as to conflict of interest. In the absence of full disclosure, it appears that this burden is placed entirely upon the employee.

Section 1 (k). Makes it illegal to require an employee who is under investigation for misconduct to submit to interrogation which could lead to disciplinary action without the presence of counsel or other person of his choice if he so requests.

This right inures to the employee at the inception of the investigation and does not require that the employee be accused formally of any wrongdoing before he may request presence of counsel or friend. The section does not require the agency or department to furnish counsel.

This section is of serious concern to all departments and agencies and could lead to a serious deterioration of employee discipline. Presumably, if a supervisor asks an employee for an explanation of consistent tardiness the employee is entitled to counsel at this stage. The section is of even more concern to the security agencies which may find it necessary to interrogate an employee concerning activities related to security matters.

Section 1 (l). Makes it illegal to discharge, discipline, demote, deny promotion, relocate, reassign, or otherwise discriminate against an employee by reason of his refusal or failure to submit or comply with any requirement made unlawful by this act.

The purpose of this section is to prohibit discrimination against any employee because he refuses to comply with an illegal order as defined by this act or takes advantage of a legal right embodied in the act.

This section, combined with Section 4, could seriously undermine the authority of the Executive to conduct its business. For example, any employee being transferred to a post to which he objects could block the transfer with a suit alleging a violation of this act until such time as the case is brought to trial and it is proven that the transfer is for the benefit of the Government and is not a disciplinary action.

Section 2. This section is intended to insure that the Civil Service Commission, acting as coordinating policymaking body in the area of Federal civilian employment, shall be subjected to the same strictures as the individual departments or agencies.

Section 3. This section applies the act to military supervisors of civilian employees.

Section 4. Permits any employee or applicant who alleges that an officer of the Executive Branch has violated or threatened to violate provisions of the act to bring a civil action in the district courts.

The potential of this section when combined with Section 1 (e) is most serious. With the written consent of any person affected or aggrieved by a violation or threatened violation, any employee organization may bring action on behalf of such person, or may intervene in such action. This would appear to establish a basis for jurisdictional conflicts between competing unions. Further,

this section and Section 5 establish two new forums for an employee who is terminated for cause to contest the termination on the issue of a violation of this act. It is interesting to speculate on the result if an employee is terminated for cause and then ordered reinstated by a district court on a finding of a violation of this act.

One of the purposes of this bill is to meet the need to attract and retain qualified personnel. It is questionable whether this section will contribute to this purpose. The court action is against the offending officer, not the department or agency. No one would willingly place himself in constant jeopardy of lawsuits by disgruntled subordinates, even though he will be defended by the Attorney General. There is always some mental anguish to the defendant of a lawsuit irrespective of the outcome.

With respect to applicants, this section has most serious implications. All departments and agencies would be subject to harassment by any applicant who is not hired for the position he feels qualified to fill.

Section 5. Establishes an independent Board on employees' rights to provide applicants or employees with an alternative means of obtaining administrative relief from violations of the act short of recourse of the judicial system. It creates the same potential for harassment as Section 4. If the employee loses his case before the Board, he can still take it to the courts. It is interesting to note that if the Board finds a violation, it may not only issue a cease and desist order, but it may also suspend the guilty employee and may even terminate the employee in the case of a second offense, without regard to any views of the head of the employing agency.

Section 6. Permits the FBI, the CIA and the NSA to request employees or applicants to take a polygraph test or psychological testing designed to elicit information concerning his personal relationship to any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters, or to provide a personal financial statement if the Directors, or their designees, make a personal finding with regard to each individual case that the test or information is required to protect the national security.

The rationale for using such tests in the proscribed areas is that the employee occupies a sensitive position in which he receives highly classified information. There are many such positions outside the three agencies given a partial exemption by this section.

Section 7. Permits the establishment of internal grievance procedures.

Section 8. This is the standard separability clause stating that if any provision of this act is held invalid, the remainder shall not be affected.